

1 **REESE RICHMAN LLP**
 2 Michael R. Reese (Cal. State Bar. No. 206773)
 3 230 Park Avenue, 10th Floor
 4 New York, New York 10169
 5 Telephone: (212) 579-4625
 6 Facsimile: (212) 253-4272
 7 michael@reeserichman.com

8 - and -

9 **WHATLEY DRAKE & KALLAS, LLC**
 10 Deborah Clark-Weintraub
 11 Elizabeth Rosenberg
 12 1540 Broadway, 37th Floor
 13 New York, New York 10036
 14 Telephone: (212) 447-7070
 15 Facsimile: (212) 447-7077
 16 dweintraub@wdklaw.com
 17 erosenberg@wdklaw.com

18 *Counsel for Plaintiffs*

19 **UNITED STATES DISTRICT COURT**

20 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

21 **SAN FRANCISCO DIVISION**

<p>22 ARNOLD KREEK, Individually And On Behalf 23 Of All Others Similarly Situated, 24 25 Plaintiffs, 26 vs. 27 WELL'S FARGO & COMPANY, WELL'S 28 FARGO FUNDS MANAGEMENT, LLC, 29 WELL'S FARGO FUNDS TRUST, WELL'S 30 FARGO DISTRIBUTORS, STEPHENS, INC., 31 WELL'S FARGO BANK, N.A., 32 33 Defendants.</p>	<p>34 Case No. CV 08-1830 WHA 35 36 PLAINTIFF EDWARD LEE'S 37 RESPONSE TO DEFENDANTS' 38 SUBMISSION RE EDWARD LEE'S 39 MOTION TO BE APPOINTED LEAD 40 PLAINTIFF</p>
--	--

1 Plaintiff Edward Lee respectfully submits the following in response to defendants Wells
 2 Fargo & Company, Wells Fargo Funds Management, LLC, Wells Fargo Funds Trust, Wells Fargo
 3 Distributors, Stephens, Inc., and Wells Fargo Bank, N.A. (collectively "Wells Fargo" or
 4 "Defendants") Submission Re Edward Lee's Motion to Be Appointed Lead Plaintiff (Dkt. 36).

5 **PLAINTIFF'S RESPONSE**

6 Defendants, in a desperate attempt to avoid liability for their misconduct at issue here, make
 7 a baseless personal attack on the proposed lead plaintiff Mr. Edward Lee. Defendants' submission,
 8 however, is without merit, and is based on nothing more than their own unfounded speculation.

9 Specifically, Defendants raise issue regarding Mr. Lee's questionnaire response that
 10 provided information regarding the post-Class Period sale of one of Mr. Lee's Wells Fargo Mutual
 11 Funds. In addition to providing information regarding the number of shares and sale price, as
 12 requested by the Court, Mr. Lee also provided information supplied to him by his broker, Charles
 13 Schwab, regarding any capital gain or loss on his investment using an average cost basis
 14 calculation.

15 As repeatedly explained to defense counsel, an average cost basis calculation is a
 16 methodology approved of by the Internal Revenue Service to determine capital loss or gain for tax
 17 purposes. It is not the methodology used to determine damages in the above-captioned action;
 18 rather that calculation is based upon the hundreds of millions of dollars of fees paid by investors
 19 that were used by Wells Fargo for undisclosed, improper purposes – *i.e.* the payment of kickbacks
 20 to selling agents of the Wells Fargo funds. Nor is the average cost basis calculation intended as a
 21 substitute for damages under the Securities Act of 1933 ("33 Act"). That measurement is pursuant
 22 to statute.¹ In other words, the average cost basis calculation is completely irrelevant to any
 23 measure of damages to be made in this case.

24
 25 ¹ Defendants' argument that the failure of the Plaintiff to have damages pursuant to the '33 Act
 26 makes him inadequate to serve as lead plaintiff in an action alleging violations of both the '33 Act
 27 and the Securities Exchange Act of 1934 ("34 Act") is without merit. In the related case of
Siemers v. Wells Fargo & Co. et al., Case no. 05-4518-WHA (N.D. Cal.), the lead plaintiff, Ronald
 28 Siemers, did have damages under the '34 Act, but did not have damages under the '33 Act. This did
 not prevent this Court from ruling that Mr. Siemers was adequate to represent the class that this
 Court ultimately certified both on a contested class certification motion and for settlement purposes.

1 Despite the irrelevancy of the average cost basis calculation, Defendants attempt to use it to
 2 attack Mr. Lee's credibility, and possibly preclude him from serving as lead plaintiff. An
 3 examination of Defendants' submission, however, shows that it is based upon unfounded
 4 speculation and is without merit.

5 There is no question that Mr. Lee relied upon the Charles Schwab calculation in good faith.
 6 Indeed, counsel for Defendants were shown the document Mr. Lee received from his broker and
 7 relied upon in completing the questionnaire. Nor is there any proof that the Charles Schwab
 8 calculation is inaccurate. Instead, based purely on speculation, Defendants argue that the Charles
 9 Schwab calculation must be inaccurate, and that Mr. Lee, despite good faith reliance on his broker's
 10 calculation, is somehow unfit to serve as the lead plaintiff in this action because he provided an
 11 allegedly inaccurate average cost basis calculation that the Court never asked for in its
 12 questionnaire. Such speculation piled on speculation, however, is meaningless and provides no
 13 basis for this Court to exclude Mr. Lee from serving as the lead plaintiff in this case.

14 In fact, the average cost basis calculation provided by Mr. Lee is not a mathematical
 15 impossibility or as simple as Defendants suggest. One of many factors that can impact an average
 16 cost basis calculation is whether the investor acquired his or her shares by way of a merger of funds.
 17 As stated on the website of Fidelity Investments (a leading brokerage and source of mutual funds):

18 **Merged funds**

19 If you own a fund that is merged into another fund, your holding period and total
 20 cost basis normally are not affected. However, since the number of shares you
 21 have after a merger may be different than the number before the merger, the
 22 average cost basis per share changes. If this is the case, when calculating gains
 23 and losses you must determine the number of shares acquired in each transaction
 24 based on the number of shares received in the merger.

25 *See Fidelity.com – Cost Basis – Cost Basis Basics – Merged Funds,*

26 *http://personal.fidelity.com/webxpress/help/topics/learn_account_cost_basis.shtml* (last visited
 27 Aug. 15, 2008).

1 Mr. Lee acquired his share of the Wells Fargo Specialized Technology Fund when the
 2 Montgomery Global Tech, Telecom and Media Fund that he owned merged with the Wells Fargo
 3 Specialized Technology Fund. As a result of this merger, the 430.7350 shares of the Montgomery
 4 Global Tech, Telecom and Media Fund owned by Mr. Lee became 1065.8970 shares of the Wells
 5 Fargo Specialized Technology Fund.²

6 Defendants' submission with respect to the average cost basis calculation provided in
 7 response to the Court's questionnaire is not the only baseless attack on Mr. Lee's credibility
 8 Defendants have launched. At the lead plaintiff hearing, counsel for Defendants implied in open
 9 court that Mr. Lee had committed perjury by failing to list on his PSLRA certification a post-Class
 10 Period transaction that Mr. Lee had included in his response to this Court's questionnaire. Counsel
 11 was forced to retract this accusation when it was pointed out that the Private Securities Litigation
 12 Reform Act of 1995 ("PSLRA") governs what is to be included in the certification, and specifically
 13 limits the transactions to be listed to those that occurred during the Class Period. This Court's
 14 questionnaire, on the other hand, specifically requested that post-Class Period transactions be
 15 provided, which explained the discrepancy. In other words, this "perjury" argument was
 16 completely without merit and should never have been made. It showed, at best, sloppiness
 17 concerning the law and the facts, and, at worst, a premeditated attempt to smear and intimidate Mr.
 18 Lee with a baseless accusation of perjury.

19 Defendants' argument regarding the average cost basis calculation made here is no different
 20 than the "perjury" argument made at the lead plaintiff hearing. It is completely unsubstantiated and

21 ² Under Supreme Court authority, acquisition of a security through a merger constitutes a purchase
 22 under the federal securities laws. *See, e.g., SEC v. Nat'l Sec., Inc.*, 393 U.S. 453, 467 (1969) "[W]e
 23 conclude that Producers' shareholders 'purchased' shares in the new company by exchanging them
 24 for their old stock."). In other words, Mr. Lee's acquisition of the Wells Fargo Specialized
 25 Technology Fund as a result of a merger of funds constitutes a purchase under the federal securities
 26 laws. Additionally, the documentation shown to defense counsel at the hearing reflected this stock
 27 merger, so they have no justification for their failure to take this into account before making their
 unfounded attack. Furthermore, as noted above, the damages suffered by Mr. Lee are measured by
 the fees he paid as a result of the merger that were used for undisclosed kickbacks – this calculation
 of damages does not change in any way if Mr. Lee purchased his Wells Fargo mutual funds through
 payment of cash or through a merger.

28

1 represents nothing more than Defendants' attempt to smear and intimidate the Plaintiff. It should be
2 seen for what it is – an attempt to avoid liability – and be rejected.

3

4

Respectfully Submitted,

5

DATED: August 15, 2008

6

REESE RICHMAN LLP

By: /s/ Michael R. Reese

7

Michael R. Reese

8

230 Park Avenue, 10th Floor

9

New York, New York 10169

10

Telephone: (212) 579-4625

11

Facsimile: (212) 253-4272

12

- and -

13

WHATLEY DRAKE & KALLAS, LLC

14

Deborah Clark-Weintraub

15

Elizabeth Rosenberg

16

1540 Broadway, 37th Floor

17

New York, New York 10036

18

Telephone: (212) 447-7070

19

Facsimile: (212) 447-7077

20

Counsel for Plaintiff

21

22

23

24

25

26

27

28